CHAPTER 9: JURY DIRECTIONS

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9.1 Introduction

It has been suggested that certain types of evidence might pose a risk of wrongful conviction, especially in the absence of a corroboration requirement – most notably eyewitness identification evidence, confession evidence and the evidence of accomplices and informers.[1] It has been proposed in previous chapters[2] that one way of countering this would be to warn jurors of the risks these types of evidence pose by way of a jury direction.[3] This chapter discusses the effectiveness of jury directions as a safeguard against the risk of wrongful conviction with reference to the relevant experimental research. It focuses primarily on eyewitness identification evidence, as this is where the vast majority of research has been done.

9.2 The experimental evidence on the effectiveness of jury directions

It has sometimes been suggested that jury directions on the reliability of witness testimony are either ineffective or undesirable and, in particular, might have the opposite effect on the jury to the one intended by drawing attention to the most damning parts of the prosecution case.[4] Roach notes that jury warnings place "enormous faith in the ability of juries to follow such instructions, despite the fact that social science and common sense suggest that warnings may not always have their desired effect".[5] In a review of the available evidence undertaken in 1995, Cutler and Penrod stated that "we are forced to conclude that the judges' instructions do not serve as an effective safeguard against mistaken identifications and convictions".[6] This section assesses these claims in light of the available experimental evidence and concludes that, contrary to Cutler and Penrod, there is reason for cautious optimism about their effectiveness.

A cautionary note about research methods

Before embarking on a survey of the research, it is necessary to say something about the methods typically used in the studies, the vast majority of which involve mock juries. Mock jury studies do have a number of limitations that might affect their "external validity": the extent to which their findings are generalisable beyond the experimental setting.[7] Most notably, these relate to

[1] See ch 4.
[2] See ch 5 (eyewitness identification evidence); ch 6 (confession evidence); ch 7 (Evidence of accomplices and informers).
[3] Another possibility would be to do so by letting the jury hear expert evidence on the subject and this is discussed later in this chapter.
[4] See e.g. Queensland Law Reform Commission, *A Review of Jury Directions* (Report 66, 2009) para 16.20; Australian Law Reform Commission, *Family Violence - A National Legal Response* (2010) para 28.22.
[5] K Roach, "Unreliable evidence and wrongful convictions: The case for excluding tainted identification evidence and jailhouse and coerced confessions" (2007) 52 Crim LQ 210 at 214.
[6] B L Cutler and S D Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (1995) 264.
[7] The classic exposition of these is W Weiten and S S Diamond, "A critical review of the jury simulation paradigm: the case of defendant characteristics" (1979) 3 Law and Human Behavior 71. For an overview of the methodological issues, see also S S Diamond, "Illuminations and shadows from jury simulations" (1997) 21 Law

inadequate sampling (especially the use of university students as 'jurors');[8] inadequate trial simulation (such as a reliance on a transcript or study pack rather than a video or trial re-enactment),[9] an absence of jury deliberation in the research design;[10] the use of inappropriate dependent variables (such as asking jurors to rate the probability of guilt on a scale);[11] and participants' awareness that they are role playing and that their decision has no real life consequences.[12]

The extent to which each of these affects generalisability is contested by psychologists. In a meta-analysis that is unfailingly cited by those using these research methods,[13] Bornstein has argued that the use of student jurors and/or trial transcripts makes very little difference to research results.[14] Others have questioned his conclusions, suggesting that this depends on the issue being researched.[15]

There is a broader consensus over the lack of deliberation.[16] As Shaffer and Wheatman put it, "perhaps the greatest limitation of mock-trial simulations is that the vast majority of them attempt to draw inferences from decisions rendered by nondeliberating mock *jurors* rather than deliberating mock *juries*"[17] and the researchers go on to discuss some of the reasons why this might be the case.[18] The deliberation process, they suggest, potentially irons out misunderstandings that might be held by individual jurors and jurors who hold prejudices (or who are disinclined to follow instructions) might not act this way in a group situation where they have to articulate their reasoning to others. There is also a vast body of social psychological literature indicating that group decisions differ from individual decisions[19] and research with real jurors has shown that deliberation does affect the verdict reached in a small but significant proportion of cases.[20]

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and Human Behavior 561; N L Kerr and R M Bray, "Simulation, realism and the study of the jury", in N Brewer and K Williams (eds), *Psychology and the Law: An Empirical Perspective* (2005) 322.

[8] Discussed by Weiten and Diamond (n 7) at 75.

[9] At 77.

[10] At 78.

[11] At 79.

[12] At 81.

[13] See e.g. H M Paterson, D W M Anderson and R I Kemp, "Cautioning jurors regarding co-witness discussion: the impact of judicial warnings" (2013) 3 Psychology, Crime and Law 287 at 301.

[14] B H Bornstein, "The ecological validity of jury simulations: Is the jury still out?" (1999) 23 Law and Human Behavior 75 at 78 (student jurors) and 84 (trial transcripts).

[15] See e.g. R L Wiener, D A Krauss and J D Lieberman, "Mock jury research: Where do we go from here?" (2011) 29 Behavioral Sciences and the Law 467 at 472.

[16] See e.g. D J Devine and others, "Jury decision making: 45 years of empirical research on deliberating groups" (2001) 7 Psychology, Public Policy and Law 622 at 625; N Nuñez, S M McCrea and S E Culhane, "Jury decision making research: are researchers focusing on the mouse and not the elephant in the room?" (2011) 29 Behavioral Sciences and the Law 439 at 443.

[17] D R Shaffer and S R Wheatman, "Does personality influence reactions to judicial instructions? Some preliminary findings and possible implications" (2000) 6 Psychology, Public Policy and Law 655 at 657 (emphasis in original).

[18] At 657-658.

[19] This is summarised by Nuñez, McCrea and Culhane (n 16) at 443-446.

[20] H Kalven and H Zeisel, *The American Jury* (1966), who found that the verdict preferred by the majority of jurors on the first ballot was *not* the eventual verdict in ten per cent of cases. See similarly M Sandys and R C Dillehay, "First-ballot votes, predeliberation dispositions, and final verdicts in jury trials" (1995) 19 Law and Human Behavior 175.

A detailed discussion of methodological concerns lies beyond the scope of this report. It is, however, important that lawyers are aware of the issues. When lawyers look to psychological studies there is a danger that they either dismiss them out of hand as having no possible relevance in the legal context or that they accept their findings uncritically. Some studies are more "realistic" in terms of the research methods they use than others[21] and thus what is required is a more nuanced position whereby there is an awareness of the research methods used by a particular study and the possible limitations of these before reliance is placed on it for policy formation purposes.

The jury direction studies

This section summarises the findings of the relevant studies. In terms of the types of warning noted above, it is only jury directions relating to eyewitness identification evidence that have received any significant research attention. As such this section will focus primarily on eyewitness identification, but many of the points made have more general application.

Even in relation to eyewitness identification, the number of experimental studies that have examined the effectiveness of jury directions is vastly outweighed by those that have examined the effectiveness of expert evidence, as indicated by the fact that there exist several meta-analyses of the latter[22] but none of the former. This may stem from the fact that the majority of the research has been undertaken by US based researchers, where the use of expert evidence is more extensive than it is in the UK jurisdictions. Some assistance might nonetheless be drawn from the expert evidence studies, as will be shown later.

A search of legal and psychological databases identified five studies in peer reviewed journals that have assessed the effectiveness of jury directions on eyewitness identification evidence.[23] Any evaluation of these studies needs to keep in mind that the desired result of a jury direction on eyewitness identification evidence is to induce what has been termed "juror sensitivity"[24] and not "juror scepticism",[25] the latter being a general mistrust of eyewitness identification evidence even when this is not merited. As such, any experimental design that does not vary the strength of the eyewitness identification is unlikely to yield any useful results.[26] The usefulness of the study is also dependent on the quality of the jury direction utilised – if the direction is difficult to comprehend and/or inaccurate then this does not necessarily mean that *all* jury directions will be ineffective. In this context, it is worth noting that the *Telfaire* direction[27] that is used by a number of the studies

[21] It has been suggested that relatively "realistic" research methods (such as videotaped trials and the use of jurors from the general population rather than students) have become less common over time: see Bornstein (n 14) at 87.

[22] See e.g. K A Martire and R I Kemp, "Can experts help jurors to evaluate eyewitness evidence: a review of eyewitness expert effects" (2011) 16 Legal and Criminological Psychology 24; M R Leippe, "The case for expert testimony about eyewitness memory" (1995) 4 Psychology, Public Policy and Law 909.

[23] For an overview of the studies, see Cutler and Penrod (n 6) ch 17; L D Dufraimont, "Regulating unreliable evidence: can evidence rules guide juries and prevent wrongful convictions?" (2008) 33 Queen's LJ 261 at 301-309.

[24] Martire and Kemp (n 22) at 25.

[25] At 26.

[26] Ibid.

[27] *United States v Telfaire*, 469 F.2d 552 (DC Cir 1972). The direction states (at paras 20-29) that: "In appraising the identification testimony of a witness, you should consider the following:

has been extensively criticised on the basis that while it lists factors that can contribute to mis-identification, it is vague as to their relevance and does not explain the way in which these can affect accuracy.[28] Finally, it is worth repeating the point that studies vary in the extent to which the experimental design replicated the real life trial setting and studies that do not include an element of jury deliberation must be regarded with particular caution.

The earliest study is that of Katzev and Wishart, who found that giving mock jurors a *Telfaire* direction after asking them to watch a 40 minute mock burglary trial resulted in a significant[29] increase in not guilty verdicts pre-deliberation.[30] Post-deliberation, the number of not guilty verdicts also increased slightly.[31] However, given the numerous flaws in the experimental design (it used student subjects, there was no variation of the strength of the identification evidence and the overall evidence against the accused was very weak[32]), little can be usefully taken from the findings.

The next significant study was carried out by Cutler, Dexter and Penrod,[33] in which undergraduate student jurors were given a *Telfaire* direction after a videotaped mock trial in which a witness identified the accused as the perpetrator.[34] They found some evidence of increased juror sensitivity (as measured by the proportion of guilty verdicts returned) from hearing the direction, although the effect was small and not significant.[35] However the experiment did not involve deliberation and

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1. Are you convinced that the witness had the capacity and an adequate opportunity to observe the offender? Whether the witness had an adequate opportunity to observe the offender at the time of the offense will be affected by such matters as how long or short a time was available, how far or close the witness was, how good were lighting conditions, whether the witness had had occasion to see or know the person in the past.
2. Are you satisfied that the identification made by the witness subsequent to the offense was the product of his own recollection? You may take into account both the strength of the identification and the circumstances under which the identification was made.
If the identification by the witness may have been influenced by the circumstances under which the defendant was presented to him for identification, you should scrutinize the identification with great care. You may also consider the length of time that lapsed between the occurrence of the crime and the next opportunity of the witness to see the defendant, as a factor bearing on the reliability of the identification.
3. Finally, you must consider the credibility of each identification witness in the same way as any other witness, consider whether the witness is truthful, and consider whether the witness had the capacity and opportunity to make a reliable observation of the matter covered in his testimony.
I again emphasize that the burden of proof on the prosecutor extends to every element of the crime charged, and this specifically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime with which the defendant stands charged. If after examining the testimony, you have a reasonable doubt as to the accuracy of the identification, you must find the defendant not guilty."

[28] See e.g. Dufraimont (n 23) at 306; C Sheehan, "Making the jurors the experts: the case for eyewitness identification jury instructions" (2011) 52 Boston College LR 651 at 680.

[29] The use of the term "significance" here (and in the remainder of this discussion) refers to statistical significance – the likelihood that the results were due to a genuine causal relationship rather than chance.

[30] R D Katzev and S S Wishart, "The impact of judicial commentary concerning eyewitness identifications on jury decision making" (1985) 76 J of Crim Law and Criminology 733 at 739.

[31] At 740. It should be noted that table 1 of their paper (at 739) erroneously omits the word "not" from "not guilty" and is therefore not a correct representation of Katzev and Wishart's results.

[32] As evidenced by the fact that post-deliberation 27 of the 30 juries returned not guilty verdicts (at 740).

[33] B L Cutler, H R Dexter and S D Penrod, "Nonadversarial methods for improving juror sensitivity to eyewitness evidence" (1990) 20 Journal of Applied Social Psychology 1197.

[34] Cutler, Dexter and Penrod also compared the effectiveness of jury directions to that of testimony from a court appointed expert and their findings in this respect are discussed below.

[35] Cutler, Dexter and Penrod (n 33) at 1202.

Cutler, Dexter and Penrod themselves acknowledge that the poor quality of the *Telfaire* direction may have been to blame for inducing scepticism in some participants.[36]

A further study was undertaken by Ramirez, Zemba and Geiselman,[37] who conducted two separate experiments. The first used similar methods to Cutler, Dexter and Penrod and found that the *Telfaire* direction caused a significant scepticism effect – jurors hearing the direction were less likely to convict in both the "good" and the "poor" identification conditions.[38] The second compared the effectiveness of the *Telfaire* instruction with a re-written instruction in which the language was simplified and the content revised to reflect more accurately the relevant experimental research. They found that there was little difference between the effectiveness of the *Telfaire* direction and their re-written direction in terms of the proportion of guilty verdicts returned. However, this finding must be regarded with caution. Like Cutler, Dexter and Penrod, their experiment did not involve deliberation and the evidence against the accused was very weak overall, suggesting that scepticism might, in fact, have been the most appropriate attitude in both the "good" and "poor" identification conditions. It is also worth noting that the revised instruction did result in a significant improvement in recall of the direction's content and a "modest" increase in juror knowledge about the relevant issues.[39]

An improvement in the realism of the experimental conditions can be found in the two experiments undertaken by Greene.[40] Her first experiment involved a videotaped assault trial that was shown to undergraduate student "jurors" in which a person was accused of throwing a bottle that hit and blinded the complainer. One of the bar staff gave evidence identifying the accused as the perpetrator. The strength of the identification evidence was varied (in the "strong" version she had an unobstructed view and the bar was well lit; in the "weak" version the bar was dimly lit and her view was partially obstructed). The jurors were given a *Telfaire* direction and were allowed 30 minutes of deliberation before reaching a "verdict".[41] In the second experiment, the conditions were identical, save for the fact that she, like Ramirez, Zemba and Geiselman, used a revised instruction, rewritten to make it linguistically more comprehensible and to reflect more accurately the findings of relevant psychological research,[42] and a shadow jury[43] was used rather than student subjects.

She found that the *Telfaire* direction caused a significant scepticism effect – the conviction rate decreased from 42 per cent to 6.5 per cent even for the strong identification evidence.[44] It had no effect when the weak identification evidence was used, where the conviction rate was three per cent regardless of whether the jury had been given the instruction, but, as Cutler and Penrod point out,[45] this was probably because the weak evidence was so weak that a jury was never going to convict. In her second experiment, the revised instruction also induced scepticism rather than

[36] At 1205.
[37] G Ramirez, D Zemba and R E Geiselman, "Judge's cautionary instructions on eyewitness testimony" (1996) 14 American Journal of Forensic Psychology 31.
[38] At 41.
[39] At 56.
[40] Both reported in E Greene, "Judge's instruction on eyewitness testimony: evaluation and revision" (1998) 18 Journal of Applied Social Psychology 252.
[41] At 256.
[42] Her revised instruction is reproduced at 263-264.
[43] Real life jurors who had been summoned to court but not ultimately selected for trial.
[44] Greene (n 40) at 258.
[45] Cutler and Penrod (n 6) at 260.

sensitivity. It resulted in a higher proportion of acquittals in the weak identification evidence condition (73 per cent compared to 42 per cent where no instruction was given and 41 per cent where a *Telfaire* instruction was given). However, it also resulted in a higher proportion of acquittals in the strong identification evidence condition (75 per cent, compared to 22 per cent for no instruction and 35 per cent for the *Telfaire* instruction).[46]

Greene's second experiment is without doubt the study that has used the most realistic experimental conditions, and it used a comprehensible and accurate jury direction, and yet this still induced scepticism rather than sensitivity. This might imply that jury directions on eyewitness identification evidence are of limited usefulness. However, her research design still had important limitations. It was a single experiment involving only 139 jurors where deliberation was limited to 30 minutes, after which jurors were asked to vote individually (rather than reach a collective decision). Most problematically, the eyewitness evidence, even in the "strong" version of the experiment, was weak – when asked if the accused was the person who threw the bottle, the eyewitness in her testimony said only that the accused "*might* have done so".[47] As such, scepticism was probably entirely appropriate. It is worth noting that Greene's rewritten eyewitness evidence instruction was extremely effective in improving juror *understanding* of the factors affecting the accuracy of eyewitness identifications – jurors who were given the rewritten instruction scored significantly better on this than jurors who were given no instruction or the *Telfaire* instruction.[48]

Finally, a rather different research method was used in a study undertaken by Martire and Kemp.[49] They used what they called a "real eyewitness design"[50] where a first set of study participants acted as "witnesses" who were asked to view a video reconstruction of a robbery and then identify the perpetrator from a line-up. They then "gave evidence" and a second set of study participants acting as "jurors" were asked whether or not they believed them. This could then be compared to the true accuracy of the identifications. The jurors in the experiment were undergraduate psychology students and they were divided into six groups where the experimental conditions were varied so that they watched either a "correct" or a "mistaken" witness give evidence and they received either a jury instruction,[51] a video of expert evidence on eyewitness identification, or no assistance at all. The researchers found that jurors were correct in their assessments 63.6 per cent of the time but that there was no significant difference between the jury direction group, the expert evidence group and the control group: "the objective accuracy of the judgments they made were not found to be significantly associated with the type of instruction they heard".[52]

But quite what can be gleaned from this study is difficult to assess. The number of mock jurors who witnessed each of the six possible scenarios was relatively small and the study design did not include any element of deliberation. In addition, the "witnesses" watched a video reconstruction rather than experiencing a real life event where environmental conditions and stress would most likely have played a part in the accuracy of their identification. Most importantly, the conditions in which the

[46] Greene (n 40) at 266.
[47] At 256, emphasis added.
[48] At 259 (no instruction and *Telfaire* instruction) and 267 (rewritten instruction).
[49] K A Martire and R I Kemp "The impact of eyewitness expert evidence and judicial instruction on juror ability to evaluate eyewitness testimony" (2009) 33 Law and Human Behavior 225.
[50] At 226.
[51] Taken from the Judicial Commission of New South Wales Benchbook.
[52] At 232.

witnesses saw the perpetrator were not varied and therefore the only variables the jurors had to go on in determining accuracy were the witnesses' reported confidence levels and their demeanour at trial. As such the usefulness of the findings is limited.

Thus far there is, at best, only limited support to be found in the experimental studies for the effectiveness of jury directions on eyewitness identification evidence. A slightly more optimistic note might be sounded by a study undertaken by Paterson, Anderson and Kemp.[53] The researchers examined the impact of a jury direction on the effect of post-event discussion among witnesses in a dangerous driving case. Mock jurors were given a trial transcript (of a dangerous driving trial) where eyewitness evidence was given by two witnesses. One gave evidence to the effect that she had seen the accused using a mobile phone. She did not mention this to the police at the time, but told them about it later after she had spoken to another witness to the event. The other witness mentioned the mobile phone in both her initial statement and in a later interview. Half of the participants were given a jury direction that mentioned the dangers associated with witness contamination. The others were either given no direction whatsoever on eyewitness evidence or were given a general direction. Here, the specific warning did not induce general scepticism but resulted in a marked sensitivity effect – there was a significant reduction in belief of the testimony of the inconsistent witness when the specific warning was given, compared to the no warning condition and the general warning condition. Such a reduction did not occur in relation to the consistent witness.[54] This did not translate into a change in beliefs about the guilt or innocence of the accused but, as the researchers suggest, this could be for any multitude of reasons, including the strength of the rest of the evidence in the case.[55] That said, the findings must be still regarded with some caution. This was not the most realistic of experiments – the mock jurors were 80 undergraduate students, it involved a transcript rather than a video reconstruction and there was no deliberation.

To summarise, the most common finding of the experimental research on eyewitness identification evidence is that jury directions appear to lead to an increase in general scepticism about such evidence, rather than a more desirable sensitivity effect. Clear evidence of the latter was found in only one study, that of Paterson, Anderson and Kemp, which examined eyewitness evidence in the context of cross-contamination rather than identification and where the experimental conditions were less than ideal. Some support for a sensitivity effect was found by Cutler, Dexter and Penrod, but their results were not statistically significant.

It would, however, be premature to conclude from this that jury directions cannot work. The studies are, as Dufraimont states, "few in number, are plagued with methodological problems and focus predominantly on the *Telfaire* instruction, which lacks the kind of informational content necessary to educate jurors about the frailties of eyewitness identification".[56] The two studies that evaluated the effect of a revised direction (Greene's experiment 2, Ramire, Zemba and Geiselman's experiment 2) were, frustratingly, both hampered by the fact that the evidence against the accused was weak overall. Thus, while both reported a scepticism effect, this may well have been the appropriate attitude. It is worth reiterating that both studies found that their rewritten directions improved juror comprehension of the relevant issues, compared to no direction at all, or the *Telfaire* direction.

[53] H M Paterson, D W M Anderson and R I Kemp, "Cautioning jurors regarding co-witness discussion: the impact of judicial warnings" (2013) 3 Psychology, Crime and Law 287.
[54] At 299.
[55] At 300.
[56] Dufraimont (n 23) at 306.

The expert evidence studies

Given the rather limited number of studies of jury directions on eyewitness identification, the question arises of whether any assistance might be gained from the larger body of experimental research that has evaluated the impact of eyewitness expert testimony on jury decision making. Martire and Kemp's meta-analysis identified 24 experiments of this nature,[57] some of which found that expert evidence induced a general scepticism effect but some of which found that it improved juror sensitivity.[58] This might be seen as a cause for optimism, as the fact that expert evidence is capable of inducing sensitivity (albeit in experimental conditions with all the generalisability caveats that this implies) suggests that appropriate jury directions might do likewise. This especially as many of the expert evidence experiments used "court appointed experts" who were not cross-examined and thus the input provided to jurors was not dissimilar to that of a judicial direction.[59]

It does, however, raise the question of whether allowing an expert to testify on the risks of eyewitness identification (or false confessions) might be more effective than a judicial direction, as has sometimes been suggested.[60]

There are a number of arguments that might be made in favour of expert evidence over jury directions. Jurors might be more willing to accept the word of an "expert" than a trial judge. They might also be more inclined to remember and follow the advice if it is given during the trial (close in time to when the witness testimony was given), in the form of questions and answers and is not buried within a long judicial direction that also includes instructions on other matters.

These arguments are, however, almost certainly outweighed by the arguments against. There is the obvious issue of cost. There is a risk of juror confusion, especially if cross-examination is particularly rigorous or if opposing experts give evidence on the same issue, and a risk that attention is diverted from more central issues in the trial. There is also the risk that prejudice may result from jurors giving inordinate weight to the testimony of an expert on the basis of factors other than the validity of their conclusions.[61] Above all, however, it would seem unnecessary (except perhaps in the most exceptional of cases), given that the scientific findings on eyewitness identification are relatively settled and are not especially complex. A suitable model direction ought to be relatively easy to prepare (and relatively easily adapted by trial judges to the circumstances).

Support for this last point is borne out by the experiments that have directly compared the effectiveness of jury directions and expert testimony in the context of eyewitness identification evidence.[62] Two studies have been reported (both of which were described above in the context of their findings on jury directions). Neither found any evidence that expert testimony was a superior method of inducing sensitivity,[63] although as both studies suffered from methodological flaws[64] this

[57] Martire and Kemp (n 49) at 25. The findings of the studies are summarised in their paper in tabular form at 31.
[58] At 31.
[59] Leippe (n 22) at 934-939.
[60] A Baxter, "Identification evidence in Canada: problems and a potential solution" (2007) 52 Crim LQ 175 at 182; S G Thompson, "Beyond a reasonable doubt? Reconsidering uncorroborated eyewitness identification testimony" (2008) 41 University of California Davis LR 1487 at 1517; R A Wise, K A Dauphinaise and M A Safer, "A tripartite solution to eyewitness error" (2007) 97 Journal of Criminal Law and Criminology 807 at 823.
[61] Sheehan (n 28) at 675.
[62] Cutler, Dexter and Penrod (n 33); Martire and Kemp (n 49).
[63] Cutler, Dexter and Penrod (n 33) at 1202; Martire and Kemp (n 49) at 231.

finding does have to be regarded with some caution. A comparison of expert evidence and jury directions in a different context – that of child witness testimony in sexual abuse trials – also found both to be equally effective in correcting misconceptions.[65] As such it is suggested here that the case for expert evidence on eyewitness identification is not made out.

The effectiveness of directions on confession and accomplice evidence

Finally, it is worth mentioning the very limited experimental research that exists in relation to confession evidence. There does not appear to have been any peer reviewed research undertaken into the effect of jury directions on confession evidence. Likewise, a search of relevant legal and psychological databases did not reveal any experimental research on the impact of jury directions in relation to accomplice evidence.[66] One study that might be of significance is that undertaken by Blandón-Gitlin and others, who examined the impact on mock jurors of expert testimony on the risk of false confessions and found that it had a limited ("significant but modest") effect on sensitising jurors to the risk of false confessions, as measured by the proportion of jurors who returned guilty verdicts.[67] However, the external validity of the experiment was not high – the subjects were 147 college students, who worked from a study pack and did not deliberate.[68]

A summary so far

The experimental studies on the effectiveness of jury directions on eyewitness testimony are inconclusive. The limited number of studies that have been undertaken have mostly shown that jury directions tend to result in increased scepticism towards all eyewitness identification evidence, regardless of its strength. However, this conclusion has to be tempered by the fact that every single study – even the most realistic – suffers from serious methodological problems. Support for the effectiveness of jury directions can be drawn from the expert evidence studies, some of which have been found to induce sensitivity, and from the one experiment that examined eyewitness testimony and witness contamination. The sole study on confession evidence (which examined the effect of expert testimony) was also successful in inducing sensitivity. Finally, there is some reason for optimism in the fact that at least two studies have shown that a well-constructed direction can improve juror appreciation of the factors affecting the reliability of eyewitness identification evidence.

There are, in summary, grounds for cautious optimism (but no more than this) that jury directions on eyewitness identification can work. Their effectiveness is, however, likely to depend on their content

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[64] See the discussion of each above at text to nn 33-36 (Cutler, Dexter and Penrod) and nn 49-52 (Martire and Kemp).

[65] J Goodman-Delahunty, A Cossins and K O'Brien, "A comparison of expert evidence and judicial instructions to counter misconceptions in child sexual abuse trials" (2011) 44 Australian and New Zealand Journal of Criminology 196 at 208.

[66] The only study of the impact of such evidence on jury decision making did not evaluate the usefulness of jury directions: see J S Neuschatz and others, "The effects of accomplice witnesses and jailhouse informants on jury decision making" (2008) 32 Law and Human Behavior 137.

[67] I Blandón-Gitlin, K Sperry and R A Leo, "Jurors believe interrogation tactics are not likely to elicit false confessions: will expert witness testimony inform them otherwise?" (2010) 1 Psychology, Crime and Law 1 at 15.

[68] At 10.

and on the manner in which they are presented. As such, it is worth turning to the broader body of research that has examined the factors that can improve the effectiveness of jury directions.

9.3 What can be done to improve the effectiveness of jury directions?

Three issues stand out from the literature: simplification of language, ensuring that the directions accurately reflect the relevant considerations and providing a written copy to jurors. Each will be examined in turn.

Simplification of language

If jury directions are to be effective, they need to convey information in a way that juries can understand and utilise it.[69] Over-complex jury directions are likely to be ineffective at best and counter-productive at worst.[70] A vast body of experimental research exists that has assessed the extent to which juries comprehend the directions they are given by trial judges[71] and, as Comiskey puts it, these "have almost unanimously concluded that a jury's ability to comprehend legal instructions is poor and that there is room for considerable improvement".[72]

To give some examples, Haney and Lynch, in a study of death penalty instructions in California, found that jurors were unable to apply them because they did not know what mitigating or aggravating meant.[73] Rose and Ogloff tested Canadian mock jurors' comprehension of a direction on conspiracy and concluded that it was "abysmally poor".[74] In research undertaken with 48 real life criminal juries for the New Zealand Law Commission, Young, Cameron and Tinsley asked jurors about the directions they had received (which included directions on the ingredients of the offence, the meaning of intent and the meaning of beyond reasonable doubt). They concluded that:[75]

> … there were widespread misunderstandings about aspects of the law which persisted through to, and significantly influenced, jury deliberations. Indeed, there were only 13 of the 48 trials in which fairly fundamental misunderstandings of the law at the deliberation stage did not emerge.

Closer to home, Thomas was granted access to jurors in three English Crown Courts who had not been selected to sit on a trial.[76] They observed a simulated trial and heard legal directions from a practising trial judge. In one court, jurors were tested on their understanding of an instruction they

[69] Dufraimont (n 23) at 297; Sheehan (n 28) at 687; Queensland Law Reform Commission (n 4) para 5.77.
[70] New South Wales Law Reform Commission, *Jury Directions* (Report 136, 2012) para 1.68.
[71] For a summary see e.g. V G Rose and J R Ogloff, "The comprehension of judicial instructions", in N Brewer and K Williams (eds), *Psychology and the Law: An Empirical Perspective* (2005) 407; N S Marder, "Bringing jury instructions into the twenty-first century" (2006) 81 Notre Dame LR 449.
[72] M Comiskey, "Initiating dialogue about jury comprehension of legal concepts: can the 'stagnant pool' be revitalised?" (2010) 35 Queen's LJ 625 at 629.
[73] C Haney and M Lynch, "Comprehending life and death matters: a preliminary study of California's capital penalty instructions" (1994) 18 Law and Human Behavior 411.
[74] G V Rose and J R P Ogloff, "Evaluating the comprehensibility of jury instructions: a method and an example" (2001) 25 Law and Human Behavior 409 at 429.
[75] W Young, N Cameron and Y Tinsley, *Juries in Criminal Trials Part Two: A Summary of the Research Findings* (NZLRC Preliminary Paper 37 Vol 2, 1999) para 7.12.
[76] C Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010).

had received on the law of self-defence. While 68 per cent of jurors claimed that they had understood the instruction, when assessed objectively only 31 per cent actually had.[77]

It has been suggested that there is no reason to be concerned about findings like these because any difficulty individual jurors have in understanding directions will be resolved during the deliberation process.[78] Deliberation can undoubtedly affect trial outcomes, as noted earlier,[79] and the studies that have examined the effect of deliberation on juror comprehension provide some support for its effectiveness in correcting mistakes.[80] However, its curative power should not be over-stated.[81] Deliberation will be effective in this respect only if, as Diamond puts it, "a significant proportion of the jurors begin deliberations with correct information; otherwise, deliberation may simply reinforce the inaccuracies of the majority".[82] In Rose and Ogloff's study of the comprehension of the conspiracy direction, deliberation made no difference[83] and the complexity of the direction may have been the reason why.

It might be questioned at this point how much of the preceding discussion is relevant to the types of jury direction that are the subject of this report. Directions on eyewitness identification evidence, confession evidence or accomplice evidence are relatively straightforward compared to some of the instructions that have been the subject of research. Juror comprehension levels have been shown to vary depending on the type of instruction,[84] with directions on procedural law generally being better understood than those on substantive law.[85]

Having said that, there is no harm in ensuring that jury directions are as linguistically straightforward as possible, while of course also retaining their legal integrity. This has been recognised in other jurisdictions – the New Zealand Institute of Judicial Studies, for example, has employed editors with expertise in writing plain English in the preparation of the Criminal Jury Trials Bench Book.[86] Indeed, experimental research has demonstrated that comprehension can be substantially improved by the use of simple language and straightforward syntax.[87] Charrow and Charrow, for example, found that juror comprehension improved by between 35 to 41 per cent (depending on the measure of comprehension used) when they re-wrote 14 US civil jury instructions in simpler language.[88] In the

[77] At 36.
[78] See e.g. Young, Cameron and Tinsley, *Juries: A Summary of the Research Findings* (n 75) para 7.25.
[79] See discussion and references at n 20**.**
[80] See the studies cited by S S Diamond, "Illuminations and shadows from jury simulations" (1997) 21 Law and Human Behavior 561 at 565 and P C Ellsworth and A Reifman, "Juror comprehension and public policy: perceived problems and proposed solutions" (2000) 6 Psychology, Public Policy, and Law 788 at 806.
[81] Comiskey (n 72) at 641.
[82] Diamond (n 80) at 565.
[83] Rose and Ogloff (n 74) at 426.
[84] Comiskey (n 72) at 642.
[85] A Reifman, S M Gusick and P C Ellsworth, "Real jurors' understanding of the law in real cases" (1992) 16 Law and Human Behavior 539 at 546-547.
[86] As noted by the New South Wales Law Reform Commission (n 70) (referencing email correspondence between them and the New Zealand Institute at para 3.25 n 35).
[87] For a review of the relevant research, see e.g. Rose and Ogloff (n 74) at 427-429; J D Lieberman and B D Sales, "What social science teaches us about the jury instruction process" (1997) 3 Psychology, Public Policy and Law 589 at 626-627.
[88] R P Charrow and V R Charrow, "Making legal language understandable: a psycholinguistic study of jury instructions" (1979) 79 Colombia LR 1306 at 1331. The instructions were on issues including causation, witness credibility, expert evidence and negligence. The authors set out a method for improving comprehension at

criminal context, other studies have achieved similar results.[89] The re-written instructions in all of these studies were approved by trial judges, who checked that the re-write was legally acceptable.

The content of the warning

If jury directions are to be effective, they need to convey accurate information about, for example, the factors that have been shown to influence the accuracy of eyewitness identification.[90] Instructions in some jurisdictions have been criticised on the basis that they either omit important information (such as the detrimental effect of stress on accuracy, the "weapon effect"[91] or the particular difficulties involved in cross-racial identifications)[92] or are actively misleading (for example by suggesting that eyewitness confidence at the time of the trial is an indication of accuracy).[93] The Scottish Jury Manual is not immune from criticism in this respect as it presently suggests that trial judges ask jurors when evaluating eyewitness identification evidence to consider *inter alia* "[h]ow positive have the identifications been, both in court and at the identification parade".[94] The experimental research suggests that, if anything, jurors should be directed that confidence at the time of the trial is *not* an indicator of accuracy.[95]

Experimental research has also suggested that juries are more likely to follow directions if it is explained to them why they are being given.[96] In the present context, this implies that a jury direction on, say, eyewitness identification evidence or confession evidence, ought perhaps to explain to the jury that people have been wrongly convicted on the basis of flawed evidence of this nature, or that errors in identification (or false confessions) have occurred in the past. In this respect, the content of reported directions given by Scottish trial judges is more positive. In *McLean*

1321-1328, which includes measures such as removing nominalizations, prepositional phrases, technical words, multiple negatives, embedded phrases and so on.

[89] See e.g. L J Severance, E Greene and E F Loftus, "Toward criminal jury instructions that jurors can understand" (1984) 75 Journal of Criminal Law and Criminology 198 (the authors tested comprehension of directions on the standard and burden of proof, intent, use of prior conviction and achieved significant improvements in comprehension following their re-write); A Elwork, J J Alfini and B Sales, "Towards understandable jury instructions" (1982) 65 Judicature 432 (the authors found that comprehension improved significantly when they re-wrote standard pattern instructions on a variety of issues including the meaning of beyond reasonable doubt, the definition of murder, the definition of insanity and the permitted use of expert evidence).

[90] K A Findley, "Judicial gatekeeping of suspect evidence: due process and evidentiary rules in the age of innocence" (2012-2013) 47 Georgia LR 723 at 773; D Ormerod, "Sounds familiar? Voice identification evidence" [2001] Crim LR 595 at 620 (emphasising the point specifically in relation to voice identification).

[91] For further information, see discussion of this issue in ch 5.

[92] M Bromby, M MacMillan and P McKellar, "An examination of criminal jury directions in relation to eyewitness identification in Commonwealth jurisdictions' (2007) 36 Common Law World Review 303 at 305 (criticising the *Turnbull* direction used in England and Wales); Wise, Dauphinaise and Safer (n 60) at 818 (criticising the US Supreme Court's proposed directions in *Neil v Biggers* 409 US 188 (1972) and *Manson v Braithwaite* 432 US 98 (1977)).

[93] Sheehan (n 92) at 679.

[94] Judicial Institute, *Jury Manual: Some Notes for the Guidance of the Judiciary* (January 2014) at 16.2.

[95] For further information, see discussion of this issue in ch 5.

[96] N Steblay and others, "The impact on juror verdicts of judicial instruction to disregard inadmissible evidence: a meta-analysis" (2006) 30 Law and Human Behavior 469 at 486; Ellsworth and Reifman (n 80) (see the studies discussed at 805); S M Kassin and S R Sommers, "Inadmissible testimony, instructions to disregard, and the jury: substantive versus procedural considerations" (1997) 23 Personality and Social Psychology Bulletin 1046.

v HM Advocate,[97] for example, the trial judge had drawn attention to the fact that "mistakes about identification have been made in court cases in the past and these have to be guarded against" (whilst also stressing that "it does not follow … that mistakes have been made here") and the appeal court praised this as a "careful" direction.[98] Likewise in *Farmer v HM Advocate*,[99] the trial judge advised the jury that "it is well known that errors in identification can arise" and that "[t]here have been cases of mistaken identity".[100] The sample direction in the Scottish Jury Manual states that "errors can occur in identification … [m]istakes about identification have been made in court cases in the past" and that "[t]hese have to be guarded against".[101]

Providing written jury directions

A final consideration is whether jury directions should be provided in writing. Although the issue has not received much attention in Scotland to date, numerous law reform bodies[102] and researchers[103] in other jurisdictions have argued for the jury to be given a written copy of the trial judge's charge to be taken with them into the jury room. In New Zealand the jury research project undertaken in 2001 resulted in the extensive use of written directions in that jurisdiction[104] and they are increasingly used in Canada[105] and in some US jurisdictions.[106]

It has been argued that written directions can lead to a number of benefits, including improvements in memory;[107] improvements in comprehension;[108] better quality deliberations (in that more time is spent applying the law);[109] reduced deliberation time (as juries spend less time trying to recall the

[97] [2011] HCJAC 99.
[98] At para 4.
[99] 1991 SCCR 986.
[100] At 987.
[101] Judicial Institute, *Jury Manual* (n 94) at 16.2.
[102] Sources are too numerous to list fully here but see e.g. R E Auld, *Review of the Criminal Courts of England and Wales* (2001) 533; New South Wales Law Reform Commission, *Jury Directions* (n 70) at para 6.121; New Zealand Law Commission, *Juries in Criminal Trials* (Report 69, 2001) para 314; Victorian Law Reform Commission, *Jury Directions* (Final Report 17, 2009) (recommendations 43 and 44 discussed at paras 6.46-6.60).
[103] An early advocate was R F Forston, "Sense and non-sense: jury trial communication" (1975) Brigham Young University LR 601 at 619 ("the advantages of using written instructions are dramatic"). More recently, see e.g. Comiskey (n 72) at 653; M Findlay, "Juror comprehension and complexity: strategies to enhance understanding" (2001) 41 BJ Crim 56 at 74; Devine and others (n 16) at 712; B M Dann, "Learning lessons and speaking rights: creating educated and democratic juries" (1993) 68 Indiana LJ 1229 at 1259.
[104] W Young, "Summing-up to juries in criminal cases – what jury research says about current rules and practice" [2003] Crim LR 665 at 669; N Madge, "Summing up: a judge's perspective" [2006] Crim LR 817 at 820. Written directions were commonly used even prior to the research: see New Zealand Law Commission (n 102) para 314.
[105] Madge (n 104) at 820.
[106] Madge (n 104) at 820; Marder (n 71) at 451.
[107] Marder (n 71) at 452; Young (n 104) at 684; L Heuer and S D Penrod, "Instructing jurors: a field experiment with written and preliminary instructions" (1989) 13 Law and Human Behavior 409 at 410; New South Wales Law Reform Commission (n 70) at para 6.119.
[108] New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper (2008) para 10.13; Young (n 104) at 684.
[109] Forston (n 103) at 619.

directions and any disputes about their content are quickly and easily resolved);[110] and improvements in juror confidence and satisfaction.[111] In relation to the first of these, Semmler and Brewer make the point that we are asking an awful lot of juries to retain the information provided by the trial judge – even the simplest charge is likely to run to several pages of instructions – and it may be that at least some barriers to increased comprehension may simply stem from limitations in working memory.[112]

There is, it has to be said, very little opposition to written directions in the academic and law reform literature. Some possible objections include the fear they might increase deliberation time (because jurors become involved in time consuming arguments over how to interpret them);[113] that they might be time consuming and burdensome for trial judges to produce;[114] or that they assume a level of juror literacy that might not be borne out in practice.[115]

The available research suggests that all (or, at worst, most) of the advantages are borne out in practice and that none of the disadvantages transpire. In England and Wales, a trial judge on the criminal circuit adopted the practice of giving written directions to jurors in all cases for a period of several months. He concluded that this "seems to have almost eliminated requests from juries for reminders or further guidance on the law. Juries also seem to be reaching verdicts more quickly."[116] Marder notes that a US judge who has given each juror a written copy of her directions for more than a decade, described the innovation as "wildly successful" and as "an inexpensive, effective way to virtually guarantee juror understanding of the law".[117] Admittedly these studies are anecdotal, unscientific and small scale,[118] but their findings are supported by surveys of real life jurors. These have found that jurors who were not provided with written directions thought that this would have assisted them in their task[119] and that jurors who did receive a written copy found it useful.[120]

[110] New South Wales Law Reform Commission, *Jury Directions,* Consultation Paper (n 108) para 10.14; Heuer and Penrod (n 107) at 411.
[111] Forston (n 103) at 619; Heuer and Penrod (n 107) at 410; New South Wales Law Reform Commission, *Jury Directions,* Consultation Paper (n 108) para 10.16.
[112] C Semmler and N Brewer, "Using a flow-chart to improve comprehension of jury instructions" (2002) 9 Psychiatry, Psychology and Law 262 at 267.
[113] New South Wales Law Reform Commission, *Jury Directions* (n 70) para 6.115; W Schwarzer, "Communicating with juries: problems and remedies" (1981) 69 California LR 731 at 754-755; Lieberman and Sales (n 87) at 626.
[114] New South Wales Law Reform Commission, *Jury Directions* (n 70) para 6.115; Heuer and Penrod (n 107) at 411.
[115] New South Wales Law Reform Commission, *Jury Directions* (n 70) para 6.115; Forston (n 103) at 620.
[116] Madge (n 104) at 821.
[117] Marder (n 71) at 500 (citing J Connor, "Jurors need to have their own copies of instructions", *LA Daily Journal*, February 25 2004 at 7).
[118] As Madge (n 104) himself accepts (at 822).
[119] B L Cutler and D M Hughes, "Judging jury service: results of the North Carolina administrative office of the courts jurors survey" (2001) 19 Behavioral Sciences and the Law 305 (surveying 1478 people who had served as jurors); Young, Cameron and Tinsley (n 75) at para 7.60 (only 24 per cent of their sample of serving jurors did not think that written instructions would have been helpful – 62.2 per cent thought that they would have been and 13.8 per cent gave no response).
[120] Young, Cameron and Tinsley (n 75) para 7.59 (where the jury received written directions "they were almost invariably appreciative").

They are also supported by the findings of experimental research,[121] the most extensive being that of Heuer and Penrod.[122] In their study, 29 judges in Wisconsin randomly assigned their trials so that some juries received written directions and some did not. After the trial was over the jurors were asked to complete questionnaires aimed at testing their understanding of the instructions they received (specifically those relating to the standard and burden of proof, the presumption of innocence, the evaluation of testimony and exhibits and procedural issues such as the allocation of responsibility for findings of law and fact) and were asked a number of questions about their experience of jury service.[123] The researchers also canvassed the views of the judges involved. They found no evidence of any of the potential drawbacks of written directions. They made no significant difference to deliberation time[124] and the judges involved reported that providing them was not burdensome or disruptive.[125] In terms of the possible advantages, jurors reported that the written instructions were very helpful in settling any disputes that did arise.[126] However, the researchers did not find that the written directions led to any improvement in the comprehension of legal concepts.[127] Despite this, the researchers concluded that their results presented "a compelling case" for written instructions and that while they might not have all the advantages claimed of them they did have some and they had no harmful consequences.[128]

Heuer and Penrod are not alone in finding that written directions did not lead to improvements in comprehension,[129] but other studies *have* reported improvements. Kramer and Koenig, for example, found that jurors who received written instructions did score better on "true/false" tests aimed at measuring comprehension of a wide range of criminal jury directions.[130] Thomas' research with shadow juries in England and Wales found that the proportion of jurors who were able to answer correctly two questions aimed at testing understanding of a self-defence direction rose from 31 per cent to 48 per cent when a written copy of the direction was provided,[131] suggesting that at least some of the incorrect answers were due to failures of memory and not of comprehension.

In fact, a research design that failed to distinguish between memory and understanding may well account for Heuer and Penrod's finding that written directions did not improve comprehension. In their study the jurors completed comprehension questionnaires some time after the trial

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[121] For an overview of the studies, see Comiskey (n 72) at 653-656; Ellsworth and Reifman (n 80) at 803-804; Lieberman and Sales (n 87) at 626-627.
[122] L Heuer and SD Penrod, "Instructing jurors: a field experiment with written and preliminary instructions" (1989) 13 Law and Human Behavior 409.
[123] At 416.
[124] The mean reported deliberation time was 2.6 hours for written instructions and 2.7 hours for oral instructions (at 421).
[125] At 423. See similarly Madge (n 104) at 822; L B Sand and S A Reiss, "A report on seven experiments conducted by District Court judges in the Second Circuit" (1985) 60 New York University LR 423 at 453-456.
[126] Heuer and Penrod (n 122) at 421.
[127] Jurors were asked six multiple choice questions and the mean correct scores were 6.7 for the written instructions and 6.8 for the oral instructions (ibid).
[128] At 429.
[129] See A Reifman, S M Gusick and P C Ellsworth (n 85) at 549.
[130] G Kramer and D Koening, "Do jurors understand criminal jury instructions? Analyzing the results of the Michigan juror comprehension project" (1990) 23 University of Michigan Journal of Law Reform 401 at 428. See also I G Prager, G Deckelbaum and B Cutler, "Improving juror understanding for intervening causation instructions" (1989) 3 Forensic Reports 187, cited in Lieberman and Sales (n 87) at 627.
[131] Thomas (n 76) at 38.

concluded,[132] a limitation the researchers themselves acknowledge.[133] Compare this to Kramer and Koenig's research, where jurors were surveyed immediately after the conclusion of the trial (and where improvements in comprehension *were* reported). That said, the role that written directions might play in improving comprehension should not be over-stated. Putting directions in writing cannot compensate for directions that are inherently unclear.[134] As Lieberman and Sales put it:[135]

> … presenting participants with written versions of unintelligible instructions cannot be expected to be beneficial. If a person does not speak a foreign language, it will not matter if they are given written or verbal instructions in that foreign tongue.

In conclusion, the case for providing written jury directions is compelling, especially if they are to play a more significant role in preventing wrongful conviction following the removal of the requirement for corroboration. They do not appear to have any negative consequences and can lead to significant benefits.

There are some practical issues. It has been suggested that a copy should be given to each individual juror – otherwise there is a danger that the person with the written copy dominates the discussion.[136] There is the issue of whether they should be provided before the oral directions are given or afterwards. In favour of the former, this enables jurors to follow them as the charge is being given.[137] In favour of the latter, there is the danger that the jury will not focus sufficiently on what is being said if they are distracted by the written copy.[138] There is also the issue of juror literacy. It cannot be assumed that all jurors will have levels of literacy that would enable them to read a written text, so provision will need to be made in this respect. Finally there is the question of whether – if written directions are thought to be beneficial – they should be mandatory (in perhaps all but exceptional circumstances) or optional and, if the latter, whether a permissive legislative provision is desirable[139] or whether a recommendation would suffice.

9.4 Conclusion

There have been a handful of studies of the effectiveness of jury directions on eyewitness identification.[140] The findings are mixed, with the most common conclusion being that they have the effect of making juries too sceptical about even strong eyewitness evidence, rather than inducing sensitivity. However, the methodological flaws in these studies mean that it would be unwise to place too much reliance on them and there is evidence from other similar studies that is more

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[132] The questionnaires were sent out by post after the conclusion of the experiment: see Heuer and Penrod (n 122) at 417.

[133] At 423. To this might be added the issue that the survey was by way of a postal questionnaire to which the response rate was only 69 per cent (at 418).

[134] A good example here might be the conspiracy direction used by Rose and Ogloff (n 74) where there was no difference in comprehension between those jurors given the oral and the written version.

[135] Lieberman and Sales (n 87) at 628.

[136] Forston (n 103) at 620.

[137] Marder (n 71) at 499; New Zealand Law Commission (n 102) para 314.

[138] Madge (n 103) at 821.

[139] See e.g. s 55B of the Jury Act 1977 in New South Wales, which provides that "[a]ny direction of law to a jury by a judge or coroner may be given in writing if the judge or coroner considers that it is appropriate to do so". See similarly s 110 of the Criminal Procedure Act 2004 (Western Australia); s 223 of the Criminal Procedure Act 2009 (Victoria).

[140] As noted earlier, there is next to no experimental research on the effectiveness of jury directions in relation to confession evidence or accomplice evidence.

promising. As such, it was concluded from the review of the relevant research that there are grounds for cautious optimism in relation to the effectiveness of jury directions in the areas that are the subject of this report.

In terms of the precise form of words to be adopted, it has already been suggested[141] that it would be advisable for an appropriate form of wording to be included in the Jury Manual but that trial judges retain the discretion to tailor this to the circumstances. The findings of this chapter indicate that this wording should be checked not only for its legal and scientific accuracy, but also for comprehensibility, ideally by those with expertise in the use of plain language.

Finally, even if it is accepted that jury directions can provide an adequate safeguard against wrongful conviction, they cannot do so in trials conducted under summary procedure. If sheriffs or lay justices are unaware of the risks posed by certain forms of evidence,[142] or about some of the more counter-intuitive findings of the scientific studies,[143] this can only be addressed by judicial training. Judicial training may also have a valuable role to play at solemn level in helping trial judges to appreciate when a jury direction is necessary and to craft appropriate directions tailored to the circumstances.[144]

9.5 Issues for consideration

It has already been proposed in previous chapters that consideration should be given to making jury directions mandatory in cases involving uncorroborated identification evidence, where identification of the accused as the perpetrator is an issue at the trial,[145] and discretionary in cases involving other types of evidence.[146] In order to maximise the effectiveness of such directions, it is suggested that the Review should consider:

(a) the provision of written directions to jurors (or providing the information in an alternative format to any juror who would have difficulty accessing a written copy);

(b) the wording of sample directions being checked not only for legal and scientific accuracy, but also for comprehensibility, ideally by those with expertise in the use of plain language;

(c) recommending that research be commissioned into the effectiveness of various forms of wording for jury directions.

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[141] See ch 5 (eyewitness identification evidence); ch 6 (confession evidence); ch 7 (evidence of accomplices and informers).

[142] No study of judicial awareness of the reliability of eyewitness testimony has been undertaken in Scotland. There is evidence from other jurisdictions that judges hold incorrect beliefs about the factors influencing the accuracy of eyewitness testimony: see R A Wise and M A Safer, "What US judges know and believe about eyewitness testimony" (2004) 18 Applied Cognitive Psychology 427 at 432; S Magnussen and others, "What judges know about eyewitness testimony: a comparison of Norwegian and US judges" (2008) 14 Psychology, Crime and Law 177 at 181; R A Wise and others, "A comparison of Chinese judges' and US judges' knowledge and beliefs about eyewitness testimony" (2010) 16 Psychology, Crime and Law 695 at 708; P A Granhag, L A Stromwall and M Hartwig, "Eyewitness testimony: tracing the beliefs of Swedish professionals" (2005) 23 Behavioral Sciences and the Law 709 at 722.

[143] Such as the "weapon effect" or the absence of a correlation between witness confidence at the time of giving evidence and the accuracy of their identification.

[144] This is reflected in the proposals for consideration in ch 5 (eyewitness identification evidence).

[145] See ch 5 (eyewitness identification evidence).

[146] See ch 6 (confession evidence); ch 7 (evidence of accomplices and informers).